No. 47326-7-II

Pierce County #14-1-03750-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEVIN A. RIVERA,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable John R. Hickman, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

FEDERAL AND OTHER STATE CASELAW

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

1. The prosecutor repeatedly committed flagrant, prejudicial misconduct in misstating crucial law and eliciting highly irrelevant, improper opinion testimony which cannot be deemed "harmless."

2. The cumulative effect of the misconduct deprived appellant Kevin Rivera of his due process rights to a fair trial by an impartial jury.

3. In the event the misconduct could have been cured by objection and instruction, Rivera was deprived of his Sixth Amendment and Article 1, § 22, rights to effective assistance of appointed counsel.

4. The sentencing court erred in ordering forfeiture of property without statutory authority and in violation of RCW 9.92.110. This Court's decision in State v. Roberts, 185 Wn. App. 94, 339 P.3d 995 (2014), controls.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Rivera was accused of assaulting the victim by punching his fist through the driver's side window of her car and striking her in the face with his fist. He maintained that the car window had shattered accidentally when his fingers hit the edge as he threw papers into the car.

   a. Did the prosecutor commit flagrant, prejudicial misconduct, misstate the law and mislead the jury about his burden of proof?

   b. Did the prosecutor commit further flagrant, prejudicial misconduct in repeatedly asking witnesses for improper opinion testimony on Mr. Rivera's guilt, veracity or credibility and the veracity and credibility of the prosecution's witnesses?

   c. Was counsel prejudicially ineffective in failing to object to the prosecutor's repeated misstatements of the law and the improper opinion testimony where the errors went directly to the heart of the prosecution's claims and the only disputed issues at trial and those failures prejudiced his client?

2. RCW 9.92.110 eliminated the doctrine of "forfeiture by conviction," under which the government had the authority

to seize and forfeit a man's property solely because he was convicted of a crime. Further, a sentencing court has no inherent authority to order forfeiture of property.

In Roberts, this Court specifically rejected the same general order of forfeiture as that entered in this case. Did the sentencing court err and act outside its statutory authority in ordering forfeiture?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Kevin Rivera was charged by amended information in Pierce County Superior Court with second-degree assault, felony harassment and third-degree malicious mischief for the same incident. CP 9-10; RCW 9A.36.021(1); RCW 9A.46.020(1); RCW 9A.46.0202); RCW 9A.48.090(1)(a); RCW 9A.48.090(2). Pretrial motions and a jury trial were held before the Honorable John R. Hickman on February 9-12, 2015.[1] The jury acquitted Mr. Rivera of the harassment charge but convicted him of the assault and harassment counts. CP 66-68.

On March 13, 2015, Judge Hickman ordered Rivera to serve a standard-range sentence. CP 69-81. Rivera appealed and this pleading follows. See CP 87.

2. Testimony at trial

Pierce County Sheriff's Department (PCSD) Deputy Montgomery Minion and his partner, Jonathon Collins, responded to a call at about 10

[1]The verbatim report of proceedings in this case consists of will be referred to herein as follows:
the chronologically paginated proceedings of February 9, 10, 11 and March 13, 2014, as "RP;"
the separately paginated proceedings of February 12, 2014, as "2RP."

in the morning on September 20, 2014, from a woman who was at a store in Ashford. RP 111-14. The woman reported an alleged assault and damage to her car, which she said had occurred when she went to serve civil paperwork at the home of a man named Kevin Rivera. RP 109-110, 143-45.

When the officers arrived at the store, the woman, later identified as Alicia Clements, was getting help from paramedics and had a bandage and some dried blood on her face. RP 119-21. She also removed her bandage to show the officers severe scrapes and scratches. RP 119-21, 133, 147, 149.

Clements pointed the officers to the broken driver's side window of her car. RP 122. Inside an officer saw some crumpled up paper that Clements said were the documents she had served on the Rivera home. RP 123, 148. Clements told the officers Rivera had hit and broken her driver's side window and thrown the papers in her car, hurting her in the process. RP 123, 148.

Clements was not the only person who called the police that day. RP 135, 163, 2RP 58-59. Rivera also called, with a different view of the events. RP 135, 163, 2RP 58-59. He told the police emergency operator that he had an intruder on his property and that he thought she had gotten cut when her driver's side window broke. RP 135, 163, 2RP 58-59.

The officers took Clements to Mr. Rivera's home, about 2 miles away. RP 126, 134, 136. Rivera, his wife and son came outside. RP 127-29, 152. Rivera met the officers at the gate, and Deputy Minion admitted that Rivera greeted them appropriately and was calm. RP 127-29, 137,

152.

Deputy Minion asked Rivera to tell him "a little bit about what happened today." RP 137-38. The officer also asked Rivera to come outside the gate. RP 137-38. Rivera complied and told the officers that someone had just been there trespassing. RP 127-28, 137-38. Minion noted there were some glass fragments on the road and asked if Rivera had broken the window on Clements' car. RP 128, 137-38.

Rivera then reported seeing Clements arrive, put some paperwork on his post and walk away. RP 130. He described grabbing the paperwork from the post and going to the woman's car, telling her she was trespassing and needed to leave. RP 130. Clements was rolling up the window when Rivera went to return the documents to her and his fingertips hit the glass, causing it to break. RP 130-31.

Alicia Clements testified about driving by Rivera's house first, getting her paperwork ready, then turning back around. 2RP 14. She stopped her car in the middle of the road, planning to go post the foreclosure documents she was serving that day on a pole beside the driveway. 2RP 14. When she got out of her car, Clements said, a "male and female" came out of the house and started yelling. 2RP 15.

Clements yelled back, saying she did not work for the bank and just had to put the notice of default and foreclosure up and take two photos, then would be "gone." 2RP 16. According to Clements, the man and woman responded, "[y]ou are not doing that" and "[i]f you don't get the fuck out of here, we are going to kill you." 2RP 15-16, 36.

Indeed, Clements claimed that, throughout the entire incident,

Rivera was constantly shouting threats. 2RP 43-44. Clements admitted, however, that she never told the emergency operator anything about threats when she called police to repor the incident that day. 2RP 44. Clements also claimed that something was thrown her direction and hit a nearby metal fence, scaring her. 2RP 21-22.

Clements went back to her car quickly. 2RP 37. She had left the door open and the window at least partially rolled down but claimed she had it completely rolled back up when Rivera got over to her car. 2RP 23-24, 32-34. Clements would later testify that Rivera then came "through the window with both fists" with the papers in his hands, at which point her window "just shattered." 2RP 23-24.

At trial, Clements claimed she had been hit in the forehead, twice, by Rivera's right fist. 2RP 24-25, 41-42. Clements said Rivera was "all the way in" the window, screaming he was going to find her and kill her and telling her to "get the fuck out of here." 2RP 25.

Initially, Deputy Minion also testified that Clements had reported to him that Rivera had struck her with his fist. 2RP 138. When the officer checked his report, however, he conceded that she had not said anything about his fist contacting her at all. 2RP 139. In fact, what she had told the officer the day of the incident was just that she was "struck in the face, and glass flew in her face and eyes," not that he struck her in the face with his fist. 2RP 138-39.

Clements said that getting the car in gear and start to move "had him out of my window." 2RP 29-30. But she also said she turned on her hazard lights and drove very slowly away, riding on the shoulder until she

could get her cellular telephone to connect so she could call police. 2RP 29-30.

Clements detailed her injuries, which included having glass in her eye and blurry vision for a few weeks, as well as scratches on her face. 2RP 28. She did not have permanent injury. 2RP 28.

Kevin Rivera testified that he was in the backyard with his wife splitting wood when he noticed someone walking outside his fence and a red car parked out front. 2RP 55-56. He walked up to ask what the person was doing but the woman got back into her car, made a "u-turn" in his neighbor's driveway, then backed up and pulled up in front of where he was standing at a post. 2RP 56. Clements had her window rolled down as she pulled up and she said something about "you got served," also "talking smack." 2RP 57.

Rivera turned around and said, "I didn't get served, you served the post. When you learn how to serve somebody right, come back." 2RP 57. He then crumpled up the papers and threw them in the open window. 2RP 57. As he did so, Rivera said, the tips of his fingers hit the edge of the window and the window just "blew up." 2RP 57. Rivera got cut on the tips of his fingers as a result. 2RP 57, 72.

Rivera freely admitted he told Clements to "get the 'F' out of here" when he spoke to her that day. 2RP 57-58. He was clear, however, that he did not strike Clements in the face. 2RP 57-58. Nor did he threaten to kill her or anything similar. 2RP 60.

Rivera also said he was not angry with Clements because she was serving foreclosure papers that day. 2RP 61. While he was affected by it,

he said, "[g]etting upset is going to do you no good." 2RP 63, 69-70.

On cross-examination, Rivera admitted that trying to throw the documents back into Clements' car was "a pretty stupid thing to do." 2RP 70-71. But Rivera was clear that it was an accident that he broke the window by slamming up against the top of it as it was coming up. 2RP 71.

Rivera knew that Clements had gotten injured and felt terrible that had happened. 2RP 73-74. He conceded that he had broken her window and she had sustained injuries as a result. 2RP 75. He also agreed that he "intentionally meant" to throw the paperwork back into the car. 2RP 75.

Police did not interview Rivera's wife, even though she was a potential witness to the alleged assault. RP 164-65. Charlotte Rivera said she saw her husband take the papers from the post, heard him tell the woman,"[n]ext time you want to serve somebody, serve them right," and watched as he threw the papers in the car. 2RP 82.

Mrs. Rivera conceded that she and her husband were a little angry with how Clements was behaving but was clear she never saw her husband strike Clements and never heard him threaten to kill her, either. 2RP 82-83, 91-92. She was sure that Clements was still rolling up her window when the glass broke. 2RP 82-83.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED REPEATED FLAGRANT, PREJUDICIAL AND ILL-INTENTIONED MISCONDUCT AT TRIAL AND IN CLOSING WHICH CANNOT BE DEEMED HARMLESS, THE CUMULATIVE EFFECT OF WHICH DEPRIVED RIVERA OF A FAIR TRIAL

Because of their unique role in our justice system, prosecutors are

endowed with "quasi-judicial" status. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). This requires them to meet a higher standard; to act with an eye not to "win" but instead to do justice and seek a conviction based solely upon proper, constitutional grounds. See, State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Only with a fair trial can we be confident that our system has worked and guilt properly decided. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). And a prosecutor's misconduct may deprive a defendant of a fair trial. See id; see, State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1994); Sixth Amend.; Art. 1, § 21.

As a result, a prosecutor has a special duty to maintain their integrity, despite the heat of the moment, steering wide from unfair trial tactics. See State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2001); State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984).

In this case, the prosecutor fell far short of these duties and committed misconduct both at trial and in closing argument.

At the outset, it is important to note that the different types of misconduct below all went to the only issue in the case - whether the prosecution proved that Rivera had the required intent for second-degree assault. There was no dispute that Rivera had broken the driver's side car window. The only real question was whether that was accidental or, as the state claimed, part of his intentional assault on Clements.

Rivera was charged with second-degree assault under RCW 9A.36.021(1)(a). CP 9-10.[2] Because "assault" is not defined by statute, Washington courts rely on the common law definition. State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). There are three such definitions: 1) an intentional "unlawful touching" (actual battery), 2) an attempt with unlawful force to "inflict bodily injury upon another, tending but failing to accomplish it" (attempted battery) and 3) intentionally placing another in reasonable apprehension of harm (making afraid). State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

The state bears a different proof of "intent" depending on which type of assault is alleged. See, e.g., Byrd, 125 Wn.2d at 713; State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011). Where, as here, the state alleges assault by actual battery, the state is claiming that the defendant engaged in an intentional touching or striking or another person which was harmful or offensive. See State v. Esters, 84 Wn. App. 180, 184-85, 927 P.2d 1140 (1996). The relevant statutes then assign degrees of the crime in general based upon the type of harm caused by that actual battery, so that a person who, with intent to inflict great bodily harm, assaults another and inflicts great bodily harm is guilty of first-degree assault. See RCW 9A.36.011(1)(c). As charged here, it is second-degree assault occurs when a defendant "[i]ntentionally assaults another and thereby recklessly inflicts

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[2]The amended information provided, in relevant part:

> That KEVIN ALBERT RIVERA, in the State of Washington, on or about the 20th day of September, 2014, did unlawfully and feloniously, under circumstances not amounting to assault in the first degree, intentionally assault A.K. Clements, and thereby recklessly inflict substantial bodily harm[.]

CP 9.

substantial bodily harm." RCW 9A.36.021(1)(a).

Regardless of the degree, however, to prove assault by actual battery, the prosecution is required to prove that the defendant intended the touching or striking of the other person. See Esters, 84 Wn. App. at 185; see also, State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000); State v. Keend, 140 Wn. App. 858, 166 P.3d 1268 (2007).[3]

Here that intent was the disputed issue for the assault. Rivera admitted to breaking the window but said it was an accident and that his hand never touched Clements' face. Thus, he denied both that an actual battery had occurred and that he had the required intent.

In trying to prove to the contrary, the prosecutor resorted to three different bouts of misconduct: eliciting improper opinion testimony, misstating crucial law on the issue of intent and further misleading the jury as to its proper role. Starting with improper opinion testimony, it is the "exclusive province" of the jury to decide guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This is because the state and federal rights to a fair trial before an impartial jury include the right to have the jury serve as the "sole judge" of the credibility of witnesses, as well as the weight their testimony should enjoy. Lane, 125 Wn.2d at 838 (quotations omitted); Sixth Amend.; Art. 1, § 21.

It is therefore improper for a witness to testify in a way which conveys an opinion about the defendant's guilt, veracity or credibility.

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[3]In contrast, for the attempted battery and apprehension definitions of assault, "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." Byrd, 125 Wn.2d at 713.

State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005). Nor may she opoine about the veracity or credibility of another witness. Id. The Sixth Amendment and Article 1, § 21, guarantees of a fair trial before an impartial jury are violated by such opinion because it invades the jury's fact-finding role. State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). In general, the testimony of a witness giving his opinion "on an ultimate fact" is not necessarily improper. See ER 704; see State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1101 (2003). Further, a prosecutor commits misconduct when he elicits improper opinion testimony, even if he does not rely on it in arguing guilt. See e.g., Montgomery, 163 Wn.2d at 590.

The standard used in reviewing improper opinion testimony on appeal depends upon counsel's actions below. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). In general, it is improper for a lay or expert witness to give their opinion on veracity, credibility or guilt, either by direct or "inferential" statement. State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). If counsel objects below, a reviewing court will examine the propriety of even inferential opinions on guilt. Kirkman, 159 Wn.2d at 937. If counsel fails to object, however, the issue is deemed waived unless there is "an explicit or almost explicit" statement by a witness as to the defendant's guilt, veracity or credibility or the veracity or credibility of a witness. 159 Wn.2d at 937.

That requirement is more than amply met here. A witness gives opinion testimony when she gives testimony based on her own "belief or

idea, rather than on direct knowledge of the facts." Demery, 144 Wn.2d at 760. Thus, an officer gave improper opinion testimony when asked what the defendant's driving pattern "exhibited" to him and the officer responded, "that the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop." State v. Farr-Lenzini, 93 Wn. App. 453, 458, 970 P.2d 313 (1999). The officer's comment went to the defendant's state of mind and the officer's belief about what the behavior meant, rather than just telling the jury the facts and letting the fact-finder decide. Id.

In Demery, supra, the Court established a set of factors which this Court looks at when deciding whether there has been an improper explicit or near explicit opinion on guilt or veracity. The Court looks at 1) the type of witness who gave the offending testimony, 2) the nature of that testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759. It is especially concerning when comments or questions parrot the relevant legal standard which the prosecution has to prove. See Kirkman, 159 Wn.2d at 595.

In this case, at trial, the prosecutor first examined Deputy Minion at length about Clements and her accusations. See RP 109-111, 119-22. The prosecutor asked the officer about the process server's "demeanor," how she got angry "realizing what had happened to her," her claims about the incident and her identification of Rivera as the person she said was involved - as Minion would describe him, "the individual who assaulted her." RP 125-26. The deputy described going to speak to Rivera and what

Rivera said about the incident, and the following exchange then occurred:

[PROSECUTOR]: [D]id he say anything as to what he did with that paperwork?

[DEPUTY MINION]: He said that he had grabbed the paperwork off the post.

Q: What, if anything, after that did he explain that he did?

A: He approached the vehicle and told her that she was trespassing, that she needed to leave immediately.

Q: And did he claim to, shall we say, return the documents to her?

A: Yes, he did. He - - as he went to put his - - put the documents back into her vehicle, she was rolling up the window. And he - -

Q: That's okay. Here's what I was kind of asking. I apologize. At some point in time, he [Rivera] returned the documents to her?

A: Yes.

Q: Did he acknowledge that a window, her driver's window, was broken?

A: Yes.

Q: And did he admit that he was the cause of that?

A: Yes.

Q: **So it's at this point you have determined what as it relates to Mr. Rivera and the incident with Ms. Clements?**

A: **Well, it's to my understanding that he was involved in an altercation with her, and that he broke her window out and struck her with his fist.**

Q: **And what, if anything, did that cause you to do regarding your contact with Mr. Rivera?**

A: **I placed Mr. Rivera under arrest for assault.**

RP 131 (emphasis added).

These were direct or nearly direct comments on Rivera's veracity, credibility and guilt - and the veracity and credibility Clements, his accuser. The testimony came from an officer; a witness whose testimony is extremely likely to hold sway with jurors due to the "special aura of reliability" jurors will apply. See Kirkman, 159 Wn.2d at 928.

Further, the nature of the testimony was such that it went directly to the charges, the defense and Rivera's guilt, clearly conveying to the jury the officer's opinion that Clements was more credible and he believed her version of events. And just to cement that opinion in jurors' minds, the prosecutor made sure the officer told the jurors that, after talking with both parties, he had decided to arrest Rivera for assault, thus making sure the jury was aware of the officer's opinion on Rivera's guilt, credibility and veracity - and that of his accuser. Finally, Clements' testimony and claims that Rivera hit her were the bulk of the prosecution's evidence against Rivera for the assault, so the improper opinion was extremely likely to sway the jury.

This improper testimony alone would be sufficient to compel reversal, but there was, in addition, more. Later, in direct examination of Clements the prosecutor asked the process server, "[b]ased upon what you observed of the defendant's conduct directed toward you, did you consider, and **did his behavior and actions appear to be intentional from what you could see**?" 2RP 31 (emphasis added). After counsel

objected, "leading," the prosecutor rephrased, asking Clements "the nature of the defendant's actions," eliciting her claim that Rivera was saying threats as he struck the window. 2RP 32. A moment later, the prosecutor asked, **"[a]ny way they could have been accidental**?" 2RP 32 (emphasis added). Clements responded, "[n]o." 2RP 32.

Thus again, the prosecutor elicited improper direct or near-direct opinion on Rivera's guilt, veracity or credibility. Rivera's defense was that the window had broken accidentally and he had not hit Clements with his hand or fist. Instead of telling the jury what she saw or what Rivera did, the prosecutor deliberately asked Clements to give her opinion of whether that behavior appeared *to Clements* to be accidental. And worse, to give her opinion about whether it *could have been* accidental. 2RP 32. The comments went directly to the crucial issue of Rivera's intent in this case.

Because it violates the defendant's rights to trial before an impartial jury, direct or near-direct improper opinion testimony is constitutional error, subject to the strict "constitutional harmless error" standard of review. Kirkman, 159 Wn.2d at 934-35. Under that standard, prejudice is presumed and reversal is required unless the prosecution can meet the heavy burden of proving, beyond a reasonable doubt, that the error was harmless. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1984).

In making its determination, this Court assumes the damaging potential of the improper opinion testimony was "fully realized." State v.

Moses, 109 Wn. App. 718, 723, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006). Further, the prosecution - not the defense - shoulders a weighty burden. Guloy, 104 Wn.2d at 426. Unlike the forgiving standard applied when the defendant challenges the sufficiency of the evidence on review, the constitutional harmless error standard requires the prosecution to show that the untainted evidence of guilt was so overwhelming that *every single trier of fact* faced with that evidence would "necessarily" have found the defendant guilty even if the error had not occurred. Guloy, 104 Wn.2d at 426.

This standard is not met just because a reasonable juror could have found guilt. See, State v. Romero, 113 Wn. App. 779, 65 P.3d 1255 (2005). Instead, this Court must reverse unless it finds that there is *no* reasonable trier of fact would have *failed* to convict based on the other - untainted - evidence at trial. Guloy, 104 Wn.2d at 426. In other words, the Court must find that every single reasonable juror would still clearly have convicted Rivera as charged even absent the admission of the improper evidence, because the evidence of guilt is so overwhelming there could be no effect from the improper opinion. This is a different standard than that used when the defendant challenges the sufficiency of the evidence on review, which applies a much more forgiving standard for the state and requires the Court to affirm unless it finds that no reasonable factfinder *could* have found sufficient evidence. See id.

Romero, supra, is instructive. In that case, the appellate court first rejected a challenge to sufficiency of the evidence, taking the evidence in the light most favorable to the state and concluding that a reasonable juror

could have found the elements of the crime under that standard. 113 Wn. App. at 782-83.

But the same evidence was insufficient to meet the constitutional harmless error test, because there was disputed evidence. Id. Even though there was significant evidence from which a juror could find guilt, where there are issues of credibility and the jury is presented with a credibility "contest," admission of improper opinion testimony will not be "harmless." Id.

The prosecution cannot meet that burden here, given the presumption of reversal this Court must apply. While there was evidence from which a reasonable juror could have found Rivera guilty, there was also disputing evidence and issues of credibility. First, Clements issues with her credibility. She claimed at trial she had been hit with a fist twice but never mentioned that to the 9-1-1 operator. She claimed at trial that she had been constantly threatened and even threatened with death throughout the incident but again, those were allegations that she did not make the day of the event. And given that the incident happened very quickly and Clements was still so agitated afterwards, a reasonable juror could have had doubt whether her perceptions of events were sufficient to support a conviction. A reasonable juror could have questions about whether the evidence presented by the state was sufficient to prove guilt beyond a reasonable doubt for assault in this case. The prosecution cannot prove that every reasonable fact-finder, faced with the same evidence but without the improper opinion testimony, would necessarily have found Rivera guilty of assault.

The prosecution cannot prove the constitutional error in admitting these direct or near direct comments on Mr. Rivera's guilt and the veracity and credibility of the witnesses. Reversal and remand for a new, fair trial is thus required. But in addition, reversal would also be required based on the other serious, flagrant and prejudicial misconduct committed by the prosecutor in closing argument in this case.

In his initial closing argument, the prosecutor focused on his theme that "this was not an accident." 2RP 109. When discussing the elements of the assault, the prosecutor told the jury, "all the evidence, all the credible evidence points to the fact that the defendant **intentionally broke that window and he was aiming for her**." 2RP 116-17 (emphasis added). The prosecutor told the jury that the "definition of assault is pretty easy" and it required only "offensive touching." 2RP 117. The prosecutor then moved on to the level of injury. 2RP 120.

For his part, counsel told the jury the case was really about whether the state had proven, beyond a reasonable doubt, that Rivera had the required intent to assault Clements. 2RP 127-28. Counsel told the jury Rivera did not "intentionally act with the intent to assault her," and that he did not act with "intent to inflict" the required level of injury. 2RP 128. Counsel said, "[h]e intentionally did what he did with his arms to put the paperwork back in the car," but he was not "intending to assault her." 2RP 128.

In rebuttal closing argument, the prosecutor declared that the jury should find the required intent to commit assault based on the defendant's

"intent" and behavior. 2RP 133. The prosecutor said there were "examples of intent that the defendant did do that I think belies the argument this was just a big accident." 2RP 133. The prosecutor went on:

> [E]xactly how does one accidentally come up to a person's window and shatter it and throw papers in? That it is an accident under what they are asking you to believe, he didn't intend to do this? This purely happened as an accident like a tree falling on you practically.

2RP 134. The prosecutor described Rivera as not willing to "accept responsibility for this behavior" and showed a picture of him, telling jurors, "[y]ou can decide if this looks like a person that accidentally shattered glass all over a woman." 2RP 135.

A moment later, the prosecutor declared, "[h]e intended. He intended. He had to decide to pick something up and he had to decide to throw it," based on Clements' claim that there had been something thrown towards her while she was at the post. 2RP 135. The prosecutor then went on:

> He decides intentionally, again, to come out from behind the gate. His gate. He's now leaving his property. He is coming to her. This is what we call intentional. This is one of the things you can look at to determine whether or not this was an accident, whether or not he acted intentionally. Every one of these acts is leading up to what eventually occurs. Every one of these things I read out for you is something he has intentionally done.

2RP 136. The prosecutor told the jury Rivera "intentionally" placed himself next to Clements' car, and that "[h]is thought is to intentionally throw the paper back at her." 2RP 137. Putting the paper through the window, the prosecutor said, was "intentional," because Rivera did not throw the paper on the ground instead. 1RP 137-38. Further, the prosecutor declared, "he intentionally put it inside her car in front of her."

2RP 137.

The prosecutor went on:

> Let's not forget we are at the window, he has intentionally placed himself there, he is deciding for whatever reason he has to give this paperwork back to her. How does he do it so hard that you know his scenario with the window partially rolled up, he only touches the top of the window with the tips, very clear, fingertips. . .how the hell do you do that? How do you do that. How do you shatter a window just because you are putting paper in?
>
> **Again, there is no dispute by him, he agreed, that's what I did. That was an intentional act. This is all his doing. These are all examples of intent.**

2RP 138 (emphasis added). The prosecutor declared that Rivera "intended to do exactly what he did in terms of breaking a window and assaulting her in some fashion," saying assault is an "unlawful touching or striking." 2RP 139.

The prosecutor concluded that "the defendant has to own this behavior," that he "intentionally broke the window" and in the heat of the moment, hit her. 2RP 141-42.

These arguments were misstatements of the law. To prove the second-degree assault as charged, it was not enough for the prosecutor to prove that Mr. Rivera intended to break the window. Or that he intended to walk over. Or that he intended to throw papers into the car. The prosecutor was required to prove that Rivera *intended the assault.* Esters, 84 Wn. App. at 185; Hall, 104 Wn. App. at 62.

It is serious misconduct for any attorney to misstate the law, but it is especially egregious when it is the prosecutor. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

Not only did the public prosecutor mislead the jury as to the crucial

requirement of his burden of proof for intent, however, he also misstated the law to the jury in another significant way. In closing argument, the prosecutor told the jury what the case "boils down to" was whether the jury believed Rivera's version that it was an accident or whether they believed Clements "that the defendant meaningfully and intentionally put his fist through the window and hit her[.]" 2RP 108. The prosecutor also told jurors that they "have to decide" which version they believed. 2RP 113. He then told jurors that Clements' version of events was "the only thing that explains the complete disintegration of the window." 2RP 113.

Later, the prosecutor returned to the same theme that the jury had to choose between one side or the other in order to decide the case:

> These are just a few things you can consider when it comes to having to pick and choose as to who you believe, **that's what it comes down to. You are the ones that are going to have to decide if you find the defendant's version credible or if you find [sic] the victim's explanation of what occurred on September 20th, 2014.**

2RP 123 (emphasis added).

Again, the prosecutor misstated the law relevant to the crucial issues in the case. The jury's job was not to decide between versions of events - that of the state or the defense.. See State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). It is not the jury's role to "solve" a case, nor does it satisfy its proper burden when it simply decides which version of events is "more likely true." See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1997). Choosing which side to "believe" is not required to decide a case such as this one because a person could really think they were telling the

truth but their perceptions could have been mistaken about what actually occurred. A fact finder tasked with deciding which side to believe is effectively using an improperly low "more likely than not" balancing instead of the constitutionally required high burden of proof beyond a reasonable doubt. See United States v. Pine, 609 F.2d 106, 108 (3rd Cit. 1979).

Reversal is required based on non-constitutional prosecutorial misconduct even absent objection below if that misconduct is deemed flagrant, ill-intentioned and prejudicial. Misconduct is flagrant and ill=intentioned regardless of evidence of a prosecutor's actual or declared motive in committing it when the misconduct has been previously condemned, and this Court has found misconduct to meet that standard even without a prior decision declaring the misconduct improper, in a case where it should be obvious that the prosecutor's acts were not proper. See, e.g., State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

Here, even without the misconduct of eliciting the improper opinion testimony from the officer and Clements, the misconduct in repeatedly misstating the crucial law of whether he had met his burden would compel reversal. The only issue at trial was Rivera's intent. The prosecutor deliberately misled the jury on that complex issue and on the jury's role. Given that the entire case was premised upon credibility, the prosecutor's acts here were serious, flagrant and prejudicial misconduc. Such misconduct compels reversal even absent objection where, as here, the corrosive effect of the misconduct could not have been "cured" by instruction.

But even in the unlikely event that this Court finds that the misconduct was not so flagrant and ill-intentioned that it compels reversal absent objection, this Court should nevertheless reversal based on counsel's ineffectiveness. Both the state and federal constitutions guarantee that a person who cannot afford counsel is appointed counsel and further that appointed counsel to assist her, and that appointed counsel provides effective assistance. See Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); see State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Cary v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 483 (2006); Sixth Amend.; Art. 1, § 22. Counsel is ineffective when, despite a strong presumption of competence, his performance falls below an objective standard of reasonableness and that deficiency causes prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990), dissapproved of in part and on other grounds by, State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015). While in general the decision to object is tactical, where, as here, there is no legitimate tactical reason for failing to object, counsel's failure is ineffective assistance.

There was no question that Mr. Rivera broke the window. The only question was his intent. Over and over, the prosecutor committed misconduct which had a direct impact on the jury's ability to fairly and impartially decide Mr. Rivera's guilt. And counsel sat mute and allowed the prosecution to mislead the jury and minimize the burden of proof. Mr. Rivera did not receive a fair trial as a result. This Court should so hold and should reverse.

2. THE TRIAL COURT ACTED WITHOUT STATUTORY AUTHORITY IN ORDERING FORFEITURE OF PROPERTY AS A CONDITION OF SENTENCE

In imposing sentence, the trial court selected a boilerplate condition on the judgment and sentence which provided, "[a]ll property is hereby forfeited." This Court should strike the order of forfeiture, because a sentencing court has no inherent authority to order forfeiture, there was no statute supporting the order and the order was in violation of RCW 9.92.110, which abolished the doctrine of allowing forfeiture of property simply based on a defendant's conviction of any crime.

In general, a sentencing court's authority to impose conditions of a sentence is limited by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Under the Sentencing Reform Act, the Legislature alone has the authority to establish the scope of legal punishment. Id. As a result, a sentencong court has only the authority granted by the Legislature by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999).

"Forfeitures are not favored." City of Walla Walla v. $401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). In addition, the authority to order forfeiture is wholly statutory. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998).

As a result, a trial court has no authority to order forfeiture unless there is a specific statute authorizing that order. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016

(1992). Importantly, this is true even when a defendant is accused of a crime. As this Court has noted, there is no "inherent authority to order the forfeiture of property used in the commission of a crime." Alaway, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. Id.; see Espinoza, 87 Wn. App. at 866.

Here, the sentencing court authorized government forfeiture of a citizen's property without due process or any legal authority for such an exertion of power.

Roberts, supra, is directly on point. In Roberts, also a case from Pierce County and this Court, the sentencing court wrote on the judgment and sentence, "[f]orfeit any items seized by law enforcement," as a condition of sentencing. 185 Wn. App. at 96. This Court rejected the prosecution's efforts to argue that there was any authority for such an order of forfeiture simply based on the conviction, instead holding that there was no statutory or inherent authority authorizing government forfeiture of items as a condition of sentencing. 185 Wn. App. at 95-96.

Further, the Court rejected the idea that a defendant must somehow make a motion for the return of property or meet some other burden in order to challenge the unlawful condition of sentencing authorizing immediate forfeiture of property. 185 Wn. App. at 96.

As this Court has specifically held, a defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction. Alaway, 64 Wn. App. at 799. Instead,

"the State cannot confiscate" a citizen's property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

The Legislature has carefully crafted such procedures and has included protections against governmental abuse of the awesome authority of taking away the property of a citizen. See, e.g., RCW 10.105.010 (law enforcement may seize certain items to forfeit but must serve notice and offer a hearing, etc.); RCW 69.50.505 (controlled substance forfeitures requiring notice, an opportunity to heard, a right of removal, a civil proceeding etc.); Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Further, many forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, **in separate civil proceedings**, that property should be forfeited as a result of its relation to a crime. See RCW 9A.83.030 (money laundering; attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, etc.); RCW 9.46.231 (gambling laws: 15 days notice, etc.). And CrR 2.3(e) governs property seized with a warrant supported by probable cause and issued by a judge which requires serving the person when the item is seized with a written inventory and information on how to get their property back if they believe

their property was improperly seized under the warrant. But that rule is limited to items deemed "(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]"

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant seized by police based solely upon his criminal conviction without at least a modicum of proof that the property was somehow involved in or the fruits of criminal activity. Nor do the statutes authorize such a forfeiture without any of the process which is constitutionally due before the government may seize the property of a man or at least the process the Legislature required before such forfeitures may occur. See, e.g., Alaway, 64 Wn. App. at 798 (rejecting the idea that the sentencing court had "inherent power to order how property used in criminal activity should be disposed of").

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the trial court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." Thus, under the statute, the mere fact that

the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture.

Here, the same county in which the improper order of forfeiture was entered in Roberts was apparently using the same draft form and same automatic forfeiture provisions. As in Roberts, this Court should strike the improper conditions or, upon reversal and remand, should indicate that if Mr. Rivera were to be reconvicted after retrial, Roberts must be followed at sentencing.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 1st day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us, and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Kevin Rivera, 56314 344th Ave. Ct. E, Ashford, WA. 98304

DATED this 1st day of February, 2016.

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